

TOPICAL INDEX

	PAGE
Jurisdictional facts	1
Statute involved	2
Statement of the case.....	2
Specifications of error.....	4
Argument	5
The evidence establishing relationship of the appellant to his father, Yip Dock, is substantial and credible.....	5
Burden of proof and scope of review.....	6
The position of the District Court.....	7
Summary of the testimony of the three witnesses heard on May 2 and May 3, 1955.....	10
Testimony of five additional witnesses heard on July 18 and July 26, 1955.....	13
Basis of the District Court's decision.....	21
Conclusion	24

TABLE OF AUTHORITIES CITED

CASES	PAGE
Chow Sing v. Brownell, 217 F. 2d 140.....	6
Fong Wone Ging v. Dulles, 217 F. 2d 138.....	6
Lee Shew v. Brownell, 219 F. 2d 301.....	6
Lee Wing Hong v. Dulles, 214 F. 2d 753.....	6
Lew Wah Fook v. Brownell, 218 F. 2d 924.....	7
Ly Shew v. Brownell, 219 F. 2d 413.....	6
Mah Toi v. Brownell, 219 F. 2d 642.....	6
Mar Gong v. Brownell, 209 F. 2d 448.....	6
United States v. Oregon Medical Society, 343 U. S. 326, 72 S. Ct. 690, 96 L. Ed. 679.....	7
United States v. United States Gypsum Company, 333 U. S. 364, 68 S. Ct. 525, 92 L. Ed. 746.....	6

REGULATIONS

8 Code of Federal Regulations (1949 Ed.), Sec. 112.2.....	5
---	---

STATUTES

Nationality Act of 1940, Sec. 503 (54 Stat. 1171, 1172).....	1, 2, 5
United States Code Annotated, Title 8, Sec. 903.....	1, 5
United States Code Annotated, Title 28, Sec. 1291.....	1
United States Revised Statutes, Sec. 1993.....	3

No. 14925.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

YIP MIE JORK,

Appellant,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

APPELLANT'S BRIEF.

Jurisdictional Facts.

This case is brought before the Court of Appeals from a judgment of the United States District Court in and for the Southern District of California, Central Division, entered August 11, 1955, dismissing plaintiff's complaint and cause of action for a judgment declaring him to be a national of the United States.

The District Court had jurisdiction of the matter under Section 503 of the Nationality Act of 1940 (54 Stat. 1171, 1172, 8 U. S. C. A. 903), and this Court has jurisdiction to review the final order on appeal under Title 28, U. S. C. A. 1291.

Statute Involved.

Section 503 of the Nationality Act of 1940, in pertinent part, reads as follows:

“If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. * * *”

Statement of the Case.

The appellant, Yip Mie Jork, was born on February 22, 1928 (C. R. 17-2-2) at Kin Mo Village, Chung Shan District, Kwangtung Province, China.

Appellant claims to be the true and lawful blood son of Yip Dock, a native of San Francisco, California, born on March 1, 1885 (K. S. 11-1-15), and a citizen of the United States. The appellee has conceded the citizenship of Yip Dock [Tr. 28]. Yip Dock made trips to China as follows:

Departed: August 8, 1907

Returned: June 20, 1908

Departed: May 11, 1913

Returned: September 28, 1913

Departed: July 10, 1926

Returned: July 5, 1929 [Tr. 28].

The said Yip Dock was married to Wong Shee on May 6, 1913 (C. R. 2-4-1) at Kin Mo Village, Chung Shan District, Kwangtung Province, China, and appellant is the issue of that marriage. Both of appellant's parents are deceased, the father having died at French Rural Camp, San Joaquin, California on December 21, 1929, and the mother in China in C. R. 34 (1945). Appellant claims to be a United States citizen and national under the provisions of Section 1993, Revised Statutes of the United States, which at the time of his birth read as follows:

“Sec. 1993. All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.”

On or about October, 1950, appellant filed with the American Consul General at Hong Kong, British Crown Colony, an application for issuance of a United States passport or other documentation permitting him to travel to the United States, and such passport or document was denied him on the ground that he is not a national of the United States.

A complaint (entitled a petition) was filed in the United States District Court for the Southern District of California, Southern Division, on December 23, 1952, praying for judgment declaring appellant to be a national of the United States. Trial was had on May 2, 1955 and May 3, 1955, and the court, Honorable Harry C. Westover, found in favor of the appellee on June 2, 1955.

On the petition of appellant, the District Court reopened the case to allow appellant to present additional witnesses to testify in his behalf, and further trial was had on July 18, 1955 and July 26, 1955. The court entered judgment for the appellee on August 11, 1955.

The sole issue involved in this appeal is whether the appellant has sustained the burden of proving that he is the lawful blood son of Yip Dock, and hence is a national of the United States.

Specifications of Error.

1. The District Court erred in finding that the evidence adduced to establish that appellant is the lawful blood son of Yip Dock is scant and that the witnesses had little real knowledge of the claimed relationship and that their testimony was, in many respects, improbable and unworthy of belief.

2. The District Court erred in finding as a fact that appellant failed to present sufficient credible evidence to sustain the burden of proving that he is a lawful blood son of Yip Dock, and in concluding that appellant had failed to sustain the burden of establishing his claim to United States nationality.

ARGUMENT.

The Evidence Establishing Relationship of the Appellant to His Father, Yip Dock, Is Substantial and Credible.

While counsel concedes that the three original witnesses, Yip Share Leung, Yip She Mang and Peter Fong, were able to supply only a portion of the essential family history of the appellant, the five additional witnesses corrected this deficiency except for a "gap" of about four years during the appellant's entire lifetime of 27 years. This "gap" seems to be the complete basis for the decision of the court below.

Counsel would urge that some consideration is due the appellant by both the trial court and the reviewing court because of the appellee's refusal to allow appellant to come to the United States, appear personally before the trial court, and give testimony in his own behalf. While Congress made statutory provisions for those in the position of appellant to journey to the United States and appear at their trial (54 Stat. 1171, 8 U. S. C. A. 903), and the regulations provide certain safeguards in the event the claim of nationality is not established (8 C. F. R. 112.2 (1949 Ed.)), the government, the appellee herein, has consistently denied the claimant a certificate of identity for entry into the United States and appearance at his trial. This practice permits the government to effectively deprive counsel of the services of his principal witness.

Burden of Proof and Scope of Review.

Counsel acknowledges that it is well settled by this Court that the appellant has the burden of establishing the ultimate fact, *i.e.*, that he is the son of Yip Dock, by a preponderance of the evidence. (*Mah Toi v. Brownell*, 219 F. 2d 642; *Ly Shew v. Brownell*, 219 F. 2d 413; *Fong Wone Ging v. Dulles*, 217 F. 2d 138; *Chow Sing v. Brownell*, 217 F. 2d 140.)

The burden of proof is said to be an ordinary one and was emphatically explained by this Court in *Mar Gong v. Brownell*, 209 F. 2d 448. (See also, *Chow Sing v. Brownell*, *supra*, and *Lee Shew v. Brownell*, 219 F. 2d 301.) In the case of *Lee Wing Hong v. Dulles*, 214 F. 2d 753, the Court of Appeals for the Seventh Circuit endorsed the language of this Court in *Mar Gong v. Brownell*, *supra*, that no special quantum of proof should be exacted from any person claiming American citizenship merely because of his racial origin, and stated at page 758:

“We agree with this statement but think it could well be expressed in more emphatic language. We would be much chagrined to think that the adjudication of an asserted right in the courts of this country was dependent in the slightest degree upon the racial origin of the party involved. To think otherwise, is to countenance discrimination in the courts, the one certain place it should be unknown.”

With respect to findings of fact of the trial court, it was said in the case of *United States v. United States Gypsum Company*, 333 U. S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746:

“Since judicial review of findings of trial courts does not have the statutory or constitutional limita-

tions of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.' * * * A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed."

To the same effect, is *United States v. Oregon Medical Society*, 343 U. S. 326, 72 S. Ct. 690, 96 L. Ed. 679.

This Court considered the "clearly erroneous" doctrine in *Lew Wah Fook v. Brownell*, 218 F. 2d 924, 925, and stated that the doctrine does not convert the appellant tribunals into fact finding *de novo* trial courts. It said further:

"The presumption of correctness of the trial court, the view of the witnesses and the live feel of the open forum are all ingredients of the compound which we may adjudge as valid or 'clearly erroneous.' "

Applying this test of the Court to the case at bar, and adhering to the rule of an ordinary burden of proof, *i.e.*, a fair preponderance of all credible evidence, the decision of the District Court should be reversed.

The Position of the District Court.

As the issue here is entirely one of fact, *i.e.*, the blood relationship between Yip Dock and the appellant, Yip Mie Jork, certain views of the court expressed during the course of the trial are pertinent. Counsel wishes to make it clear that he considers the District Court to have been most fair in reopening the trial and hearing testimony of additional witnesses. Three witnesses were presented at the original trial, and, at that time, counsel was not

aware that other persons, principally from the San Francisco area, had knowledge of appellant's pedigree and early history.

At the reopening of the trial, appellant presented five additional witnesses. From the general remarks of the court, it will be seen that the credibility of the witnesses is not seriously challenged, but rather the court is concerned with a so-called "gap" in proving the identity of the appellant continuously from the date of his birth. This "gap" covers only the time from a few weeks after birth until he was approximately four years of age. While the pertinent comment of the court will be discussed more fully hereinafter, it is desired to point out now that the court did state that it *assumes that a marriage occurred between Yip Dock and Wong Shee [Tr. 175], that children were born of this marriage [Tr. 175], and that the court does not doubt that one of the children bore the name of the appellant, Yip Mie Jork [Tr. 100].*

With respect to the original three witnesses, the court stated at page 100 of the transcript: "You know, I am not questioning the credibility of the witnesses, I am not basing this upon the credibility of the witnesses, * * *."

The comment made by the court at the conclusion of the testimony on July 26, 1955, immediately prior to ruling in behalf of appellee, demonstrates again the fairness of the District Court in granting the reopening, but confirms its belief that the evidence was not quite substantial. At pages 202-203 of the transcript, the court said:

"So, I just don't think the court is justified in finding for the plaintiff on this sort of testimony. The Circuit Court has just written an opinion; I didn't bring it in with me, I didn't know I was going

to refer to it, in which the Supreme Court pointed out that these are precious rights, they shouldn't be taken away from the alleged children without substantial proof. On the other hand, these are sacred rights and they shouldn't be given to anyone without some substantial evidence. I don't think the evidence is substantial, that there is enough in this case.

Mr. Kidder, I reopened the case for you because I wanted you to present any evidence you had. The Circuit leans over backward in these cases in favor of the plaintiff. The Circuit may decide there is enough evidence in this case to justify a finding in favor of the plaintiff, but I just don't find it."

and again at pages 203-204:

"Well, I wanted to give you the opportunity to present all the evidence you have. I am very sympathetic with these claims and I want you to present all the evidence you have. Maybe if you will take this to the Circuit, the Circuit will decide there is sufficient evidence in this case to justify the court in determining that the claim of the plaintiff is valid. I am not holding that the claim of the plaintiff is not valid. I am just holding that the plaintiff has not sustained the burden of proof in establishing that in the mind of the court."

Consequently, the question here then is whether the District Court is clearly erroneous in holding that the testimony of the eight witnesses, the contents of the Immigration and Naturalization files relating to the family, and the contents of the file of the Department of State in the name of appellant, are insufficient to sustain the burden of proof.

Summary of the Testimony of the Three Witnesses
Heard on May 2 and May 3, 1955.

YIP SHARE LEUNG.

This witness testified he is the half brother of the appellant and was born at Tao Gong Village, China, 48 years of age, the son of Yip Dock and the latter's first wife, also named Wong Shee [Tr. 30-31]. His mother, Wong Shee, died in C. R. 2 (1913) and his father remarried the same year [Tr. 37]. The witness first came to the United States in 1919 and made the following trips to China:

Departed: C. R. 15 (1926)

Returned: C. R. 20 (1931) [Tr. 39].

Departed: December, 1947

Returned: November, 1949 [Tr. 40].

His first knowledge of the birth of his half brother, Yip Mie Jork, was in the year 1928 when the father wrote to him at his temporary residence in Canton City and informed him of the birth [Tr. 35, 45].

The witness first saw Yip Mie Jork in Macao in the year 1949 [Tr. 35, 51]. At that time, the witness had journeyed to China and surrounding area to paint people and scenery and give an art exhibition in Hong Kong. Shortly before returning to the United States in November, 1949, he wrote to his half brothers, Yip Mie Jork and Yip Share Wong in Kin Mo Village and invited them to visit him. They came to Macao and stayed with him a few days [Tr. 46, 47]. Photographs of all three were taken in 1949 at Macao [Tr. 49] and are in evidence in the present trial. Moreover, in the year 1947, before the witness decided to journey to China,

he gave a letter and \$50.00 to one Peter Fong, a United States resident, for delivery to Yip Mie Jork at Kin Mo Village [Tr. 45-46], and Mr. Fong testified he delivered such articles [Tr. 64].

The court was concerned, of course, about how the witness could recognize the appellant as his half brother when their first meeting did not occur until the year 1949. On this point, the witness testified as follows:

“Q. How did you know this was your brother Yip Mie Jork who came to Macao? A. He came to see me, and then we began to ask, to talk about family affairs and the mothers, the village, and we talk about these affairs, so naturally we know they was my brothers.” [Tr. 47.]

* * * * *

“The Court: How did you recognize them? (Yip Mie Jork and Yip Share Wong)

The Witness: They come over and ask me in the hotel and I come down and meet them and we introduced each other, and we go up to the hotel and we talk over family affairs, and I talk about a minute, and I took in the village and so many years I haven't met them, and I have to talk all the things I know, and they answer me, and I have no doubt in my mind it is my brother, so I put him in—I live on the 4th floor, I remember, and they live in the next room to my room. When you talk to your brother, you ask all the questions, all about the village, all the mother, and all these questions, and they answer, and in that way I have no doubt in my mind they are my brothers.” [Tr. 51-52.]

Certainly it is not unreasonable to believe that two persons, having opportunity to talk of family affairs for

two days, could not become completely satisfied of their common ancestry and blood relationship.

This witness is the closest relative of the appellant residing in the United States.

YIP SHE MANG.

This witness was born on January 7, 1928 at Canton City, China, and is presently a student at the University of California [Tr. 54-55]. He is the son of Yip Share Leung (the first witness) and hence the appellant is his uncle.

The witness first saw the appellant in Kin Mo Village in 1938, for a period of three or four days, when the witness paid a visit to the Yip home with his mother, two brothers and a sister [Tr. 56]. The witness was then about 11 or 12 years of age. He testified further that he remembers the incident of the visit very well because he and his uncles (Yip Mie Jork and Yip Share Wong) were practically the same age, played around the house together [Tr. 58-59], and, in the course of such play, the witness received an injury in the region of his eye and has a permanent scar there [Tr. p. 59].

This witness came to the United States first in 1949 [Tr. 59]. He identified photographs of the appellant and other family members [Tr. 60-61].

PETER FONG.

This witness was born at On Ngai Village, China on August 20, 1920, and is a naturalized citizen of the United States [Tr. 62-63]. He first came to the United States in 1923 [Tr. 62]. His home village is located about one English mile from Kin Mo Village [Tr. 64]. He first

met appellant's half brother, Yip Share Leung, in Los Angeles, California about 1946 and, when the witness was preparing to visit China in September, 1947, the said Yip Share Leung gave him the sum of \$50.00 and a letter to be delivered to Yip Mie Jork in Kin Mo Village [Tr. 64]. The witness delivered the letter and money to Yip Mie Jork in 1947 at the Yip home in Kin Mo Village, and he identified a photograph of Yip Mie Jork [Tr. 66].

Testimony of Five Additional Witnesses Heard on July 18 and July 26, 1955.

LEONG LAN GIN.

This witness, a female, was born on September 11, 1930 in Kin Mo Village [Tr. 104]. She lived in the said village at the home of her parents until she was 18 years of age [Tr. 104] and she locates her home as the last house in the third row counting from the east side of the village [Tr. 105].

This witness is the one who has supplied the most knowledge of appellant's early childhood. The Yip home, where appellant lived was in the same row of houses as that of the witness, and only four houses separated the two domiciles [Tr. 106]. Her testimony concerning her first meeting with Yip Mie Jork and their ages is as follows:

“Q. When did you first meet Yip Mie Jork? A. When we were children at the age of about six years old, we played together in the same street or alley.

The Court: Do you remember when you were six years of age?

The Witness: Well, maybe I don't remember all the other things, activities, but we were playmates from that time on in the same street or alley.

The Court: How old was Yip Mie Jork? Was he your age?

The Witness: A few years older than I.

The Court: How few? Six, seven, eight, one, two?

The Witness: About five years or so.

The Court: Older?

The Witness: Yes.

The Court: When you were six, then he was about 11, is that right?

The Witness: Yes." [Tr. 106.]

Besides playing with Yip Mie Jork in the village streets, the witness testifies to having been in the Yip home on birthdays and other festive occasions, for dinner with her whole family, and stated that Yip Mie Jork often came to her home for dinner and on special occasions [Tr. 107-108]. She began her schooling in Kin Mo Village at ten years of age and appellant attended the same school, although he was in a higher grade. She saw him in school and in the recreation field [Tr. 108].

The witness also testified that a woman named Wong Shee lived in the Yip home with appellant and Yip Share Wong, and that the two boys called the woman "mama" [Tr. 112]. She identified pictures of the said Wong Shee [Tr. 114], as well as of the appellant and Yip Share Wong. The witness also identified a photograph of the person known as Yip Dock (the appellant's father) and asserted that there was a larger picture of this person in the home of the appellant [Tr. 115].

The court remarked [Tr. 199] that it thought this witness was pretty young to remember having met Yip Mie Jork when she was only six years of age. Also, as she

stated the appellant was "5 years or so" older than she, it seemed improbable to the court that an 11-year old boy would play with a 6-year old girl. Actually there is only a difference of two and one-half years in their ages. The error in guessing the age of appellant, especially when the court impelled her to make some conjecture, does not seem to warrant the importance attached to it. A child would not ordinarily know the exact difference of age between herself and a playmate. Counsel would also differ with the court on the capability of remembering incidents occurring at the age of six years, particularly as to neighborhood matters or constant companions. We do not have here the case of children whose families move about either constantly or occasionally; rather, the witness and appellant were neighbors for 18 continuous years, residing only four houses apart. Having played with appellant as a child, attended the same school, exchanged visits in their respective homes, and being well acquainted with his mother and brother, it is not at all unlikely that the witness would have a very good memory of her first meeting with appellant and of the other incidents of their childhood and early youth. If her testimony is believed that she first met Yip Mie Jork when she was six years of age, *i.e.*, about 1936, then her statements serve as proof that appellant, when he was approximately $8\frac{1}{2}$ years of age, was living in the Yip home in Kin Mo Village with Wong Shee (the wife of Yip Dock), whom he called "mama." As this witness has precise knowledge of appellant and his family for at least 12 years, her testimony adds great weight to appellant's cause.

RUSSELL CHAN.

The witness was born in San Diego, California, on May 8, 1924, and is a citizen of the United States [Tr. 124]. He was taken to China in 1927 at the age of three years and lived in New Nam Shan Village until 1938 [Tr. 125]. He also visited in that village from 1947 until 1950 and it is located about 2½ miles from Kin Mo Village [Tr. 125-126].

When the witness was about seven or eight years of age, he met the appellant in the Yip home in Kin Mo Village [Tr. 126]. Thereafter, he saw the appellant three or four times a year until 1938, as his mother and the appellant's mother exchanged visits and were accompanied by their children [Tr. 127-128]. The witness testified as follows:

"The Court: This boy you saw when you were seven or eight years old, you say was Yip Mie Jork. How do you know that?

The Witness: Because I went to his house and his mother told me.

The Court: His mother told you this was Yip Mie Jork?

The Witness: Yes, and then I play with him.

The Court: You played with him?

The Witness: Yes." [Tr. 129.]

The witness also saw the appellant during his trip to China between 1947 and 1950, approximately three or four times during each of those years [Tr. 134]. He identified a picture of appellant's mother, Wong Shee, the father, Yip Dock, and the other members of the family [Tr. 135-137]. He also asserted that he saw a large picture of Yip Dock on the living room wall of the Yip

home, and that it is the exact photograph, except larger in size, as the one included in Plaintiff's Exhibit 1 [Tr. 136].

FAY JEAN CHEW.

This witness was born in New Nam Shan Village, China, on March 12, 1930, and lived there until she was 18 years of age [Tr. 143-144]. Her village is about one hour's walking distance from Kin Mo Village [Tr. 143]. When asked whether she was related to the appellant, she testified: "My grandma is the younger sister of Mie Jork's mother's father" [Tr. 144]. Although counsel did not—and neither did the court—recognize the relationship from this description (although it was perceived later [Tr. 176]), the appellant and the witness are actually FIRST COUSINS. Her first recollection of appellant is when she was eight or nine years old and he was ten or eleven years of age [Tr. 145]. She names his parents as Yip Dock and Wong Shee [Tr. 145], but was not permitted by the court to give additional testimony on the matter of pedigree on the belief that she was not a member of the family [Tr. 148]. She saw the appellant two or three times a year, stayed overnight in the Yip home in Kin Mo Village, made visits there with her grandmother and sister [Tr. 146] and one time stayed two weeks and another time stayed three weeks in the Yip home. In addition, Yip Mie Jork visited at her home in New Nam Shan Village, once or twice a year, with his mother and brother, Yip Share Wong [Tr. 147]. She states that she discussed family relationship matters with Wong Shee and that the latter was married and the name of her husband was Yip Dock [Tr. 147].

The witness left her home in New Nam Shan Village in 1948 to marry [Tr. 150] and she last saw the appellant in 1949 in her home village when she went back to visit her family and he was visiting there too [Tr. 151]. She identified photographs of the appellant and other members of the family including the mother, Wong Shee, and the father, Yip Dock [Tr. 149-150].

CHIN SHEE.

This witness was born at Old Nam Shan Village on December 26, 1900 and first came to the United States in 1919 [Tr. 153-154]. He first met Yip Dock in 1920 (an error in the transcript records this date as 1900 [Tr. 155]) in Stockton, California, and saw him many times until 1924-1925 at Bock Chai Tong Drug Store in that city, which drug store was operated by a brother of the witness. The said brother was also a friend of Yip Dock, and when the latter died in 1929, the personal effects of Yip Dock, including a wrist watch, fountain pen and clothing, were left in care of the brother [Tr. 156]. These articles were handed to the witness in 1935, when he embarked for a trip to China, for delivery to the wife of Yip Dock who lived in Kin Mo Village adjacent to the home village of the witness [Tr. 157]. The witness testified that he delivered the aforementioned personal effects of Yip Dock to the wife in Kin Mo Village in the year 1935, at which time there were two children in the home named Yip Mie Jork and Yip Share Wong [Tr. 157-158].

This witness also saw appellant on a second trip made to China in the year 1947 [Tr. 158], and a picture depicting this witness with a large group of Chinese (including Yip Mie Jork) taken on a visit to the ancestral

tombs in 1947, is in evidence as Plaintiff's Exhibit 7. The witness last saw Yip Mie Jork in 1949 in Macao with his brothers, Yip Share Wong and Yip Share Leung [Tr. 160].

The witness identified photographs of Yip Dock, Yip Mie Jork, Yip Share Wong and Yip Share Leung [Tr. 161].

CHew JOck.

This witness was born on January 12, 1896 in How Chow Village, Chung Shan District, China, and is a citizen of the United States [Tr. 164-165]. His home village is approximately two hours walk from Kin Mo Village [Tr. 166] and another village where the witness had a later residence, Hin Bin Chin Village, is only about one hour's walk from Kin Mo Village [Tr. 165-166].

This witness first came to the United States in the year 1915 [Tr. 165]. He first met Yip Dock in 1918 in Stockton, California, and saw him many times at Wah Kwen Grocery Store in that city [Tr. 167].

This witness made a trip to China in the year 1926 and remained there until approximately May or June, 1928 [Tr. 165]. He testifies that about November, 1926, he met Yip Dock and the latter's wife, Wong Shee [Tr. 167] and Yip Dock attended the wedding banquet of the witness in How Chow Village [Tr. 168]. The witness attended a birth feast in March or April, 1928 at the home of Yip Dock in Kin Mo Village for a male child named (Yip) Mie Jork [Tr. 169], and characterizes this feast as a "full moon party" for Yip Dock's baby [Tr. 181]. He last saw Yip Dock at a hospital in Stockton, California, about 1929 [Tr. 169].

On a second trip to China made by the witness in 1947, he saw a person named Yip Mie Jork, who came to the home of the witness in Hin Bin Chin Village. He also saw Yip Mie Jork in 1947 when the latter attended an engagement feast given for the son of the witness, and saw Yip Mie Jork again in 1948 at the wedding feast of the son of the witness [Tr. 170-171]. He last saw Yip Mie Jork in 1949 at the home of the witness [Tr. 171].

The witness identified photographs of Yip Dock, Yip Mie Jork, Yip Share Wong and Yip Share Leung [Tr. 171-172].

The government sought to establish a discrepancy in the testimony of this witness by placing in evidence Defendant's Exhibit A, a questionnaire form of the Immigration and Naturalization Service, signed upon the return of the witness to the United States in 1928. This form contains questions written in the English language. The answers are not in the handwriting of the witness and are purportedly recorded by a Chinese interpreter of the Immigration and Naturalization Service just prior to disembarkation at the port of entry. The form is used only in the cases of Chinese persons. The questionnaire signed by the witness contains the following interrogatories:

"Q. Did you visit any resident of this country who happened to be at his home during your recent stay in China, or did you visit the home of such resident? A. No." [Tr. 183.]

"Q. Were you introduced to the son, daughter or wife of any resident of this country? A. Wong Sue Ngit, wife of Jeung Yuk Sung, living in Ling Gung Village." [Tr. 184.]

The witness denied having answered the first question in the negative [Tr. 183], and concerning the second inquiry, stated he could not recall or remember what was asked him at that time [Tr. 184]. It should be noted that in contemplating the questions literally, the person interrogated would have to be positive in answering that he was speaking about a "resident" of this country.

The fact that Yip Dock was in China with his wife and new born child at the time might well negative a belief in the mind of the witness in 1928 that Yip Dock would be classified as a "resident" of the United States. The incident of the questionnaire seems hardly to amount to a major discrepancy destroying the credibility of the witness.

Basis of the District Court's Decision.

As heretofore mentioned, the court's decision seems to be based entirely upon the so-called "gap" in the early history of the appellant. The court said [Tr. 204]:

"* * * there is a gap that I don't think you have been able to cover at all. All you have got is from the date of the birth of the child, and then there is a gap until he is six years of age when he was found in the home of Yip." [Tr. 204.]

On the same page, the court also said:

"Just because there is a child in the home, I don't think that is an indication that the woman in the home is the mother of the child, or the father who goes to the home is the father of the child. In China, the Chinese people have a strong feeling of family responsibility. Of course, there is no evidence here that this alleged mother took a stranger into the family or relative into the family, but, however, it is possible such a thing happened.

“I am not holding that the claim of the plaintiff is not valid. I am just holding that the plaintiff has not sustained the burden of proof in establishing that in the mind of the court.”

The court mentions but one matter which it catalogs as a discrepancy [Tr. 201]. It concerns the female witness Leong Lan Gin, the playmate of appellant in Kin Mo Village. It is suggested by the court that this witness should have been more accurate in estimating the difference between her age and that of the appellant. She testified he was “a few years older,” then upon further inquiry of the court, stated “about five years or so” [Tr. 106]. The court considers this as testimony of a difference of five years in their ages, whereas, an actual difference of only $2\frac{1}{2}$ years existed. The court stated: “You just cannot make a mistake of fifty per cent, a mistake of two and a half years” [Tr. 201].

Counsel urges that it is not at all unlikely that a female witness, guessing at the difference in age of herself and a childhood playmate, especially an older boy, would make an honest error. If this be regarded as a discrepancy, it hardly deserves such weight that it would obliterate the balance of her testimony based on intimate knowledge of the Yip family.

Counsel is dubious that he could secure testimony covering all of the early years of his life, and believes members of this Court might find it equally difficult. The “gap” of which the District Court complains, is infinitesimal considering that apart from a period of approximately four years, the entire life of appellant as the son of Yip Dock and Wong Shee has been covered. One of the witnesses (Chew Jock) attended his birth

feast in March or April of 1928; another witness (Russell Chan) saw the appellant in the Yip home in Kin Mo Village about 1932 or 1933; another witness (Chin Shee) saw him in the Yip home in Kin Mo Village in 1935 another witness (Leong Lan Gin) remembers him first when she was about six years of age (1936), played with him in the streets, went to school with him and visited in his home; other witnesses, including a first cousin, saw him frequently from the late 1930's until at least 1949 and identified his photograph and those of members of the family. Moreover, there is not the slightest indication that the appellant is an adopted child, or that he could be the child of another member of the Yip family being reared in the Yip household in Kin Mo Village.

The quality and quantity of evidence presented in this case would serve easily, in the opinion of counsel, to establish the identity of a Caucasian or non-Caucasian in a civil action to create a record of birth filed in the Superior Court of the State of California. It is unfortunate here, of course, that both parents are deceased, but this factor should not increase the weight of the burden of proof resting upon this Chinese appellant.

A portion of the testimony of most of the witnesses concerns the location of Kin Mo Village and the manner of traveling thereto from Hong Kong or Macao. While at first the court was under the impression that the witnesses were not in agreement as to the location of the village, any doubts seem to have disappeared after counsel for appellant obtained and utilized a Chinese map which delineated in detail the area where the said village is located.

Conclusion.

There is substantial evidence that appellant is the lawful blood son of Yip Dock, and that the District Court is clearly erroneous in finding and concluding that appellant has failed to sustain the burden of proving his relationship to Yip Dock by a preponderance of the evidence.

Wherefore, appellant prays that the judgment of the lower court be reversed and that he be declared to be a national of the United States.

Respectfully submitted,

MARSHALL E. KIDDER,

Attorney for Appellant.